

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-221087 **DATE:** December 4, 1985
MATTER OF: The W.H. Smith Hardware Company

DIGEST:

Bid on a total small business set-aside solicitation which fails to indicate that bidder intends to furnish supplies manufactured by a small business is nonresponsive and the fact that the bidder represented itself as a small business and a manufacturer for Walsh-Healey purposes and indicated its plant as the place of manufacture does not cure the deficiency.

W.H. Smith Hardware Company (W.H. Smith) protests the rejection of its bid as nonresponsive to invitation for bids (IFB) No. DAAE07-85-B-K063, a total small business set-aside, issued by the United States Army Tank-Automotive Command (Army), Warren, Michigan. W.H. Smith certified that it was a small business concern and that it was a manufacturer of the supplies being offered under the Walsh-Healey Act representation; however, it did not certify that all the supplies to be furnished would be manufactured or produced by a small business.

We dismiss the protest without obtaining an agency report since it is clear from the record that the protest is without legal merit. See 4 C.F.R. § 21.3(f) (1985).

W.H. Smith contends that since it stated in its bid that its plant would be where the manufacturing, assembling, and shipping would take place, its failure to complete the small business representation and certification should have been waived because the bid as a whole showed that all supplies would be manufactured by a small business.

The certification concerning the bidder's obligation to furnish products manufactured by a small business concern is a matter of bid responsiveness which cannot be waived because it involves a performance commitment, i.e., to furnish small business products. Thus, a bidder's intention to furnish such products must be established at the time of

bid opening. See J-MAR Metal Fabricating Co., B-217224, Mar. 21, 1985, 85-1 C.P.D. ¶ 329. Otherwise, if the bid were accepted as submitted, the small business contractor would be free to provide the supplies from either small or large business manufacturers as its interests might dictate, thus defeating the intent of the set-aside program. See Teco, Inc., B-220705, Oct. 22, 1985, 65 Comp. Gen. ___, 85-2 C.P.D. ¶ 442.

We have held that the bidder's failure to assume the obligation to furnish supplies manufactured or produced by a small business is not obviated by completion of the IFB's place of performance and shipping point because it only expresses a present intent to provide the principal production facility. The listing of the production facility is informational in nature and, thus, related to bidder responsibility rather than to bid responsiveness. Therefore, a firm is not necessarily precluded from altering its designated place of performance after bid opening. See Automatic Limited, B-214997, Nov. 15, 1984, 84-2 C.P.D. ¶ 535. Moreover, a small business bidder which represents itself as a manufacturer for Walsh-Healey purposes is not prohibited from subcontracting and has not, in fact, legally obligated itself to manufacture the offered supplies. Rather, the firm could subcontract the entire work to a large business manufacturer if its business interest so dictated. Stellar Industries, Inc.--Request for Reconsideration, B-218287.2, Aug. 5, 1985, 64 Comp. Gen. ___, 85-2 C.P.D. ¶ 127.

Therefore, we do not find that W.H. Smith's representation that it was a small business and the indication that it intended to manufacture the supplies at its plant was sufficient to show a binding obligation to furnish supplies manufactured or produced by a small business.

The protest is dismissed.



Robert M. Strong
Deputy Associate General Counsel